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No. 90-1306

In The

Supreme Court of the United States

October Term, 1990

KING ISLAND NATIVE COMMUNITY,

Petitioner,

vs.

STATE OF MONTANA DEPARTMENT OF FAMILY SERVICES,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARC RACICOT
Attorney General
CLAY R. SMITH*
Solicitor
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record
for Respondent

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the petitioner was entitled to request transfer of the child custody proceeding below pursuant to 25 U.S.C. § 1911(b) of the Indian Child Welfare Act in the absence of jurisdictional retrocession pursuant to 25 U.S.C. § 1918.

2. Whether, if the petitioner was entitled to request transfer pursuant to 25 U.S.C. § 1911(b), the state courts improperly applied the good cause exception in that provision under the facts before them in denying such request.

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Respondent State of Montana Department of Family Services respectfully submits its brief in opposition to the petition for writ of certiorari.

STATEMENT

This matter arose in Fergus County, Montana when a petition for temporary investigative authority and protective services was filed on September 2, 1988 by the Fergus County Department of Family Services ("County Department") with respect to T.S. pursuant to Mont. Code Ann. § 41-3-402 (1989) (App. at 10a).[1] T.S., then 3½ years old, resided in Denton, Montana with her natural mother and her stepfather. The report accompanying the petition stated that the County Department had received anonymous telephone calls on August 30 and 31, 1988 concerning possible neglect or abuse of the child, and County Department social workers visited T.S.'s home on the latter date, where they interviewed the child and her mother. The mother complained of physical abuse from her husband, while the child had "a red and blood shot left eye" reportedly caused when she had been struck by the mother with a wet washcloth. The mother indicated that she wanted to leave her husband and return to Alaska but lacked transportation or money. She and her child were then taken to an emergency services facility, and T.S. was placed into a licensed foster home later that

[1] Mont. Code Ann. § 41-3-402(1) authorizes the filing of such petitions "[i]n cases where it appears that a youth is abused or neglected or is in danger of being abused or neglected[.]"

day. Telephonic communications occurred on September 1, 1988 between County Department personnel and Alaska child protective services representatives in Anchorage, who reported a history of referrals for physical and other abuse of T.S. by her mother.

The district court granted the petition on the date of its filing, most importantly authorizing the County Department to assume protective custody over T.S. for 90 days, appointing a guardian *ad litem* for her, and setting a show cause hearing on September 20, 1988. *See* Mont. Code Ann. § 41-3-403(1)(c) (1989) (App. at 12a). Following that hearing, the district court entered a second order maintaining the September 2 order in effect and directing the County Department to prepare by December 20, 1988 "a report of the results of its investigation and any recommended disposition as to this matter."

At some point prior to December 1988, County Department representatives orally contacted the attorney for petitioner King Island Native Community to which T.S.'s mother belongs. The attorney requested the County Department to relinquish the child voluntarily to the petitioner's tribal court, but the request was refused. On December 27, 1988 the petitioner filed a motion to intervene in the state court proceedings pursuant to 25 U.S.C. § 1911(c) of the Indian Child Welfare Act ("ICWA"), and intervention was granted the next day.[2]

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[2] The ICWA applies to any "child custody proceeding" affecting Indian children, which term in part encompasses "foster care placement" and "termination of parental rights" proceedings. 25 U.S.C. § 1903(1)(i), (ii) (App. at 1a). "Foster

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On December 29, 1988 the County Department filed in the state district court a petition for permanent legal custody of T.S. and for termination of the mother's parental rights. *See* Mont. Code Ann. § 41-3-401 (1989) (App. at 8a).[3] The petition alleged that a service treatment agreement between the County Department and the mother adopted by the district court on September 22, 1988 had not been complied with by the mother, that her parental unfitness was unlikely to change within a reasonable time, and that she had returned to Alaska. A notice setting hearing on the petition for February 7, 1989 had

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care placement" means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[,]" while "termination of parental rights" means "any action resulting in the termination of the parent-child relationship[.]" (App. at *Id.*) Instantly, there is no dispute that the County Department's September 1988 petition initiated a "foster care placement" proceeding. A second petition, which is discussed in the text and was filed on December 29, 1988, initiated a "termination of parental rights" proceeding. There is also no dispute that T.S. is an "Indian child" as defined in 25 U.S.C. § 1903(4) since her mother is a member of the petitioner and she is eligible for membership. The petitioner, lastly, is both an "Indian tribe" as defined in 25 U.S.C. § 1903(8) and an "Indian child's tribe" with respect to T.S. under 25 U.S.C. § 1903(5). (App. at 2a-3a.)

[3] Mont. Code Ann. § 41-3-401(3) provides that such petitions constitute "a civil action brought in the name of the state of Montana." To the extent the petition for writ of certiorari herein names the Department of Family Services as the respondent, it is technically in error.

previously been forwarded to the mother, the guardian *ad litem* and the petitioner's attorney on December 28, 1988. The hearing was later rescheduled to February 23, 1989.[4]

The petitioner filed a motion to transfer the proceeding to its tribal court pursuant to 25 U.S.C. § 1911(b) and a supporting brief on February 21, 1989. The County Department opposed the transfer request, stating that good cause existed for its denial. The mother joined in the petitioner's transfer request on March 10, 1989. Several additional briefs were submitted addressing the transfer question, the last containing an affidavit by a tribal court judge which stated in part that, "[u]pon an Order by the Fergus County District Court transferring this case to the King Island Tribal Court, our Tribal Court is prepared to issue an immediate Custody Order and send a tribal representative to Montana to bring [T.S.] back to Alaska where she will be placed in an appropriate Native foster home, pending disposition of this matter." (Petition at A37.)

An evidentiary hearing concerning the transfer request occurred on July 19, 1989, at which only a County Department social worker and T.S.'s foster mother testified. The social worker stated the child had done "remarkably well" in foster care but still had "a lot of problems." He added that her foster mother was Indian and that there had been no contact with the child by any tribal representative or member of her extended family since the County Department assumed custody. His

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[4] The February 23 hearing was later vacated at the petitioner's request. The parental rights termination petition remains unresolved pending disposition of this matter.

investigation revealed no indication T.S. had resided in Nome or any other area where the Community had ICWA "reservation" status. The social worker believed T.S.'s best interests would be served by her remaining in Montana since "there's no way that the child is going to survive another move." He then explained the basis for that conclusion:

> Basically where we came up with [the fact that T.S. had always lacked a stable home environment] was . . . that [the mother] has travelled from Anchorage to Illinois to Spokane. She was a time in Great Falls. She was a time in Montana. She was back to Alaska. It was basically obtained from the Alaska Police Department is where we got a lot of the information. I mean, they didn't actually reside in Alaska for any period of time. They were all over the country, and [T.S.] was just drug from one place to the other.

His opinion was reinforced by the foster mother's testimony. The petitioner, although appearing at the transfer hearing through counsel, offered no evidence concerning the effect of transfer to Alaska on T.S. or the County Department's ability to present evidence concerning the pending parental rights termination petition.

The state district court entered a memorandum order denying the transfer request on December 4, 1989. (Petition at A28.) It reasoned that good cause existed for nontransfer because (1) there had been little or no contact between the petitioner and T.S. or her family prior to the proceeding's initiation, (2) witnesses with information most pertinent to the parental rights termination petition were located in Fergus County, and (3) the child's best interests would not be furthered by removal to Alaska

since "[t]he uncontroverted evidence of the hearing in this matter indicated strongly that any transfer of this child from her present environment would 'devastate' the child and would have long-term harmful effects upon her." (Petition at A31-A32.)

The petitioner appealed the state district court's decision to the Montana Supreme Court. The latter court affirmed the transfer denial, agreeing with the district court's factual findings concerning the impact on T.S. if she were removed to Alaska and the inconvenient nature of an Alaskan forum. (Petition at A8, A12; 801 P.2d at 80-81, 82.) The Supreme Court found no support in the record for the petitioner's claim that "there [had] been intentional delay resulting in a greater period in which bonding has occurred in the foster home." (Petition at A11; 801 P.2d at 81.)[5]

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[5] The Supreme Court did not discuss the factual basis for this conclusion. However, the district court record reflects that briefing on the petitioner's transfer request was not completed until April 3, 1989 and that the petitioner took no action to schedule a hearing on such request. After the evidentiary hearing on July 19, the parties engaged in further briefing on the transfer issue, which did not conclude until September 29, 1989. The district court, finally, relied only on evidence adduced during the July 19 hearing in its December 4 memorandum opinion. There is accordingly no basis for the petitioner's claim of either intentional or institutional delay prejudicing its interests.

SUMMARY OF THE ARGUMENT

The questions raised in the petition assume entitlement to referral jurisdiction under 25 U.S.C. § 1911(b) with respect to the parental rights termination proceeding involving T.S. However, the petitioner is subject to state adjudicatory jurisdiction under Public Law No. 280 and has not reassumed jurisdiction over child custody proceedings in accordance with 25 U.S.C. § 1918. Absent reassumption of such jurisdiction, the transfer provisions in § 1911(b) did not apply to its request and, therefore, the questions raised in the petition need not be addressed.

Even if the transfer provisions in § 1911(b) did apply below, no substantial federal question exists warranting review of the Montana Supreme Court's decision. Section 1911(b) does not require transfer of a child custody proceeding affecting an Indian child not domiciled or residing within the reservation of its tribe from state to tribal court if good cause for denying transfer is present. The ICWA does not define the term "good cause" but, with one exception, those courts applying such term have held that the child's best interests may constitute an element in determining whether transfer should occur. Courts, moreover, have recognized without exception that *forum non conveniens* considerations may serve as a basis for denying transfer. Consequently, even without reference to the best interests of T.S., transfer of jurisdiction over the parental rights termination proceeding to the petitioner's court was denied on wholly acceptable grounds. The petitioner thus does little more than dispute factual determinations which, while fully supported by the record below, it dislikes.

ARGUMENT

I. Absent a Showing That the Petitioner Reassumed Jurisdiction Over Child Custody Proceedings Under 25 U.S.C. § 1918, the Transfer Provisions in 25 U.S.C. § 1911(b) Did Not Apply to the Proceeding Below.

Although not argued before the state district court, the issue of whether the petitioner was entitled to transfer of the parental rights termination proceeding to its courts pursuant to 25 U.S.C. § 1911(b) in the absence of reassumption of jurisdiction over child custody proceedings under 25 U.S.C. § 1918 (App. at 5a) was raised by the respondent before the Montana Supreme Court. That court chose not to address the issue in its opinion. Notwithstanding the Supreme Court's silence, review on the merits of the questions raised in the petition should occur only if this Court first determines the petitioner was eligible for referral jurisdiction under any circumstances.[6]

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[6] The lack of the issue's discussion does not mean that, as a matter of state appellate practice, the court concluded the respondent's right to raise the underlying applicability of the transfer requirement in § 1911(b) had been waived. *See, e.g., McCain v. Batson*, 233 Mont. 288, 298, 760 P.2d 725, 731 (1988) ("the Court will uphold the result below if it is correct, regardless of the reasons given below for the result"); *Phillips v. City of Billings*, 233 Mont. 249, 252, 758 P.2d 772, 774 (1988) (same). Even had the issue been deemed waived as a matter of state law, it cannot be disregarded for purposes of resolving the petition, since the petitioner would seemingly lack Article III standing to challenge the Montana Supreme Court's decision unless, as a threshold matter, it is encompassed within that class of tribes to which referral jurisdiction under § 1911(b) is

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Recognizing that tribal courts in Alaska and other states which have been given or voluntarily assumed civil jurisdiction under Public Law No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, 28 U.S.C. § 1360), might be ill-suited to adjudicate child custody proceedings, Congress has required tribes in such states to secure approval from the Secretary of the Interior before exercising exclusive or referral jurisdiction over those proceedings pursuant to § 1911(a) or (b):

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588) . . . or pursuant to any other Federal law, may reassume jurisdiction over child custody proceed ings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

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available. *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[w]e have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) ("[s]tanding to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court").

25 U.S.C. § 1918(a); *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 n.16 (1989) ("where Public Law 280 jurisdiction is present, ICWA § 1918 permits a tribe . . . to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior"). Section 1918(b) contains certain criteria which the Secretary may consider in determining reassumption petitions and additionally accords him substantial discretion in granting partial retrocession of jurisdiction:

> In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

25 U.S.C. § 1918(b)(2). The House Report accompanying the bill eventually adopted as the ICWA summarized § 1918(b) as follows:

> Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted

> as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

H.R. Rep. No. 1386, 95th Cong. 2d Sess. 24-25, *reprinted in* 1978 *U.S. Code Cong. & Admin. News* 7530, 7547.

It is thus quite clear that, as § 1918's literal language indicates, tribes subject to Public Law No. 280 have neither exclusive jurisdiction under § 1911(a) nor referral jurisdiction under § 1911(b) over child custody proceedings until the requisite secretarial approval is received. Notice of such approval, moreover, must be published in the Federal Register, and the retrocession of jurisdiction only becomes effective 60 days after that publication. 25 U.S.C. § 1918(c). The petitioner alleged below no secretarial authorization of its reassumption of jurisdiction over child custody proceedings, and none is reflected in the Federal Register. There is consequently no dispute that, were the proceeding below initiated in Alaska, transfer would have been foreclosed by the lack of § 1918 retrocession.[7] The only question is whether a different

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[7] Consistent with the express mandate of § 1918, the Alaska Supreme Court has found a lack of tribal court jurisdiction in child custody proceedings, absent reassumption, in § 1911(a) and § 1911(b) contexts. *In re K.E.*, 744 P.2d 1173 (Alaska 1987) (per curiam) (remanding for determination of whether reassumption had been authorized where Indian child alleged to reside within his native village); *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska), *cert. denied sub nom. Native Village of Nenana v. Alaska Department of Health and Social Services*, 479 U.S. 1008 (1986) (affirming superior court's denial of a transfer request under § 1911(b) with respect to an Indian child domiciled away from his native village); *cf. Native Village*

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result should apply simply because the proceeding is pending in another state. Both the ICWA and common sense suggest not.

Although § 1911(b) directs transfer of a child custody proceeding involving an Indian child domiciled away from his reservation "to the jurisdiction of [his] tribe" upon the tribe's petition absent good cause to the contrary or parental objection, it obviously contemplates that such transfer will be to a tribal court since the final sentence of § 1911(b) permits the requesting tribe's court to decline acceptance of the transfer. The term "tribal court" is defined as "a court *with jurisdiction over child custody proceedings* and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (emphasis supplied). Here, however, the petitioner's tribal court lacks jurisdiction, at least for § 1911(a) or (b) purposes, because reassumption of authority over child custody proceedings has not been effected pursuant to § 1918. The retrocession provisions themselves explicitly condition exercise of *any* exclusive or referral jurisdiction over child custody proceedings by a tribe subject to state

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of Venetie I.R.A. Council v. Alaska, 918 F.2d 797, 810-11 (9th Cir. 1990) (suggesting that, while a native village was not divested of inherent authority over child custody proceedings by Public Law No. 280, exclusive or referral jurisdiction under the ICWA was conditioned on § 1918 retrocession).

court jurisdiction under Public Law No. 280 upon secretarial approval, and nothing in that section can reasonably be construed as limiting the approval requirement to proceedings arising within the state where the tribe is located. Section 1918 was instead intended to preclude tribal exercise of exclusive or referral jurisdiction over child custody proceedings pursuant to the ICWA "until such time as there is satisfactory proof that a particular tribe has the ability to properly adjudicate such cases" established through compliance with such section. *Native Village of Nenana*, 722 P.2d at 222. A different conclusion would create a jurisdictional distinction between a tribe's resident state and all other states wholly unsupported by a natural reading of § 1918 or its underlying purpose of ensuring an adequate forum for resolving child custody disputes.[8] Transfer under § 1911(b) to the petitioner's tribal court was therefore not required without regard to the good cause exception.

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[8] Tribal court adjudication of child custody proceedings entails not only the entry of orders but also the availability of appropriate child care services to carry out those orders. One of the reassumption criteria utilized by the Secretary is thus whether "[c]hild care services sufficient to meet the needs of most children the tribal court finds must be removed from parental custody are available or will be available at the time of reassumption of jurisdiction[.]" 25 C.F.R. § 13.12(5) (1990). Needless to say, the need for those services exists irrespective of whether the involved child over whom jurisdiction is transferred resided within or without the tribe's state prior to such transfer.

II. Under the Particular Facts Presented, the Montana Supreme Court's Decision Represents an Appropriate Application of the Good Cause Exception in § 1911(b).

Reduced to its essentials, the petitioner's argument derives from the premise that an Indian child's best interests may never be considered by a state court in making referral determinations under § 1911(b). Use of the best interests factor thus is portrayed as "necessarily assum[ing] that the tribal court either is not competent to decide the case, or is unwilling to act in the child's best interests, or both." (Petition at 11.) Its argument, however, ignores the absence of any textual basis in the ICWA for such a narrow construction of good cause and the particular facts in this matter.

The party opposing transfer to tribal court jurisdiction under § 1911(b) bears the burden of establishing good cause for the retention of state court jurisdiction.[9] That term is not defined in the ICWA, but House Report 1386 commented it was "intended to permit a state court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to ensure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." H.R. Rep. No. 1386 at 21, *reprinted in* 1978 *U.S. Code Cong. & Admin. News* at 7544. The *forum non conveniens* doctrine has been relied upon in various

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[9] *E.g., In re Adoption of R.R.R.*, 763 P.2d 94, 104 (Okla. 1988); *In re Wayne R.N.*, 757 P.2d 1333, 1335 (N.M. Ct. App. 1988); *In re M.E.M.*, 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981).

cases as a ground for finding good cause to refuse transfer,[10] but other reasons have included delay in tribal intervention in the state court proceedings,[11] delay in submitting a transfer request,[12] or the perceived adverse emotional or physical impact on an Indian child if uprooted from its present familial environment.[13] These decisions reflect unanimity among state courts that the good cause standard in § 1911(b) must be applied flexibly to balance the interests of the affected parties in light of the case's specific facts.

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[10] *E.g., In re Robert T.*, 200 Cal. App. 3d 657, 666-67, 246 Cal. Rptr. 168, 174 (1988); *In re Wayne R.N.*, 757 P.2d at 1336; *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988); *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984); *In re Bird Head*, 331 N.W.2d 785, 790 (Neb. 1983); *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 191 (Ariz. Ct. App. 1981), *cert. denied sub nom. Catholic Social Services v. Pima County*, 455 U.S. 1007 (1982).

[11] 25 U.S.C. § 1911(c) grants a child's Indian custodian or tribe the right to intervene "at any point" in a foster care placement or termination of parental rights proceeding. Tribal intervention in other child custody proceedings is not guaranteed by this provision, but the right of a tribe to intervene may exist independently under state law. *See In re J.R.S.*, 690 P.2d 10, 1519 (Alaska 1984) (tribe did not have right to intervene under § 1911(c) in an adoption proceeding but did have such right under state court rules); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 233 (Ariz. Ct. App. 1983) (same).

[12] *E.g., In re Dependency & Neglect of A.L.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 550 (S.D. 1989); *In re Robert T.*, 200 Cal. App. 3d at 665, 246 Cal. Rptr. at 173-74; *In re Laurie R.*, 760 P.2d 1295, 1299 (N.M. Ct. App. 1988); *In re Wayne R.N.*, 757 P.2d at 1335-36.

[13] *E.g., In re Robert T.*, 200 Cal. App. 3d at 667, 246 Cal. Rptr. at 174-75; *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988); *In re G.L.O.C.*, 205 Mont. 352, 357, 668 P.2d 235, 238 (1983).

Indeed, the only state appellate decision suggesting that the best interests of an Indian child may not be considered in determining referral jurisdiction good cause issues is *In re Armell*, 550 N.E.2d 1060 (Ill. Ct. App.), *cert. denied sub nom. Armell v. Prairie Band of Potawatomi Indians*, 111 S. Ct. 345 (1990).[14] It reasoned that "considerations involving the best interests of a child are relevant not to determine jurisdiction but to ascertain placement." Id. at 1065. Whatever merit this reasoning had under the

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[14] The petitioner also argues that three other decisions, *In re B.W.*, 454 N.W.2d 435 (Minn. Ct. App. 1990), *Pima County Juvenile Action No. S-903*, *supra*, and *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), support the proposition that a child's best interests may not be considered. (Petition at 16-18.) *B.W.*, however, involved an appeal from a termination of parental rights and did not address the good cause issue. *Pima County* and *Halloway* both arose from application of the mandatory transfer provision in § 1911(a), although *Pima County* did discuss general § 1911(b) transfer criteria in dicta but not the question of whether, under appropriate circumstances, transfer could be denied because of its effect on a child's emotional or physical well-being. 635 P.2d at 191-92. The quotation from *Pima County* at pages 17 and 18 of the petition is unrelated to any § 1911(b) issue; it instead was concerned with whether, if the Arizona courts had possessed jurisdiction, the biological mother's parental rights could be terminated in part because of the impact on the child of removal from its adoptive parents. The Arizona court resolved that question in the negative, as has the Montana Supreme Court under its state law. *E.g.*, *In re Guardianship of Aschenbrenner*, 182 Mont. 540, 547-48, 597 P.2d 1156, 1161 (1979); *In re Guardianship of Doney*, 174 Mont. 282, 286-87, 570 P.2d 575, 578 (1977); *In re Fish*, 174 Mont. 201, 206, 569 P.2d 924, 928 (1977).

facts in *Armell*,[15] here it has none. The petitioner unequivocally indicated through the tribal judge's affidavit and in a later submission to the state district court[16] that it intended to remove T.S. to Alaska if jurisdiction was transferred, and the district court relied upon these representations in denying transfer.[17] There is consequently no dispute that, had transfer been ordered, T.S. would have been taken from her foster parents in Montana and placed in a new familial setting in Alaska. There is equally no dispute, on the basis of the state district court record, that such a transfer would have been harmful to her. Under these circumstances, the petitioner's suggestion that the effect of a child's placement in an entirely

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[15] There an appeal was taken from a trial court determination that good cause did not exist to deny transfer of a child custody proceeding, after which determination the trial court awarded custody to the tribe's social service agency and the agency directed that the child remain with her present foster parents while a placement investigation was conducted. 550 N.E.2d at 1063. It appears that, at the time the tribal agency's order was made, the child was living with her foster parents in California. *Id.*

[16] D.C. Doc. 20 at 1-2 ("The Tribe has become extremely concerned about the delay which has taken place so far, and given the stage in which this proceeding is presently at, unless this matter is made a priority by all parties, this matter could drag on for a considerable time yet to come. This would not be in the best interest of [T.S.]. Especially, assuming *arguendo*, that the Tribe is ultimately successful in having the child returned to the State of Alaska").

[17] "The Tribe argues here that the Indian Child Welfare Act mandates a transfer of the jurisdiction of this case to the Tribal Court in Alaska. They have further argued that physical custody of the child . . . should also be transferred to the Tribe." (Petition at A29.)

different environment must be ignored as a matter of law in § 1911(b) transfer decisions cannot be reconciled with either the ICWA's use of the broad term "good cause" or the legislative history indicating that term is to be applied flexibly so as to balance the interests of the affected parties, including the Indian child.[18]

Contrary to the petitioner's claim (Petition at 7-11), *Holyfield* neither compels nor even suggests a contrary conclusion. That decision, as the Montana Supreme Court observed (Petition at A13; 801 P.2d at 82), is inapposite because it was concerned only with the existence *vel non* of exclusive tribal jurisdiction under § 1911(a) – an issue

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[18] "Although the Department of the Interior's interpretive ICWA guidelines do not specify a child's best interests as a consideration in resolving good faith transfer questions, relevant commentary states that, where there has been limited contact between a child and the reservation of its tribe, "the shock of changing cultures may, in some cases, be harmful to a child." 44 Fed. Reg. 67,584, 67,591 (1979) (Guideline C.3 Commentary) (App. at 16a). The guidelines then suggest that a determination as to the possibility of such culture shock "can be made by the parent, who has a veto on transfer to tribal court" and that, even if a parent is unavailable, "[s]tate court authority to make such decisions is limited to those cases where the child is over five years of age" since "[m]ost children younger than five years can be expected to adjust more readily to a change in cultural environment." *Id.*

It nevertheless seems clear that, when the parent is being accused of neglect in a child custody proceeding, her judgment as to the child's best interests may be less than dispassionate or reliable. Moreover, the assumption that children younger than five years will necessarily be more amenable to changes in cultural environment is a generalization which, in this matter, appears highly suspect. Under the circumstances here the guidelines are entitled to little, if any, deference.

turning there solely on where the involved children were domiciled. *See In re M.R.D.P.*, 787 P.2d 1219, 1224 (Mont. 1990) (rejecting claim that transfer mandated under § 1911(a) should be denied because of the child's bonding with adoptive parents; "[t]he sole issue under consideration is whether the tribal court has exclusive jurisdiction under 25 U.S.C. § 1911(a)"). Nothing in *Holyfield* proscribes consideration of the effect of uprooting a child from its present familial environment as part of good cause decisionmaking under § 1911(b).

Finally, the Montana Supreme Court and the state district court did not rely exclusively upon the best interests of T.S. in denying transfer. They also pointed to the inconvenience of a tribal court forum thousands of miles away from Fergus County where the majority of witnesses and evidence pertinent to the parental rights termination petition are located. The Department of the Interior guidelines recognize that "application of [the *forum non conveniens*] criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg. 67,591 (Guideline C.3 Commentary) (App. at 17a); *accord Chester County Department of Social Services v. Coleman*, 399 S.E.2d 773, 776 (S.C. 1990) (per curiam) (reversing transfer order where the substantial majority of witnesses and evidence was located in South Carolina, "while the tribal court is located several thousand miles away in South Dakota"). This additional factor militating against transfer

underscores the fact-bound nature of the decision below and its inappropriateness for review.[19]

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[19] The petitioner states that, "[i]f the tribe determined it would be more convenient to have the case heard in Montana, it could send a tribal judge to Montana, or could appoint a judge from a local tribe or a resident Indian lawyer to act as a special master to take testimony and make findings after hearing the matter in Montana." (Petition at 12.) Before the Montana Supreme Court, however, the petitioner was far less forthcoming:

> As pointed out by the Tribe in earlier briefing, . . . the participation of witnesses telephonically is a common practice in Alaska. Furthermore, if required, the Tribe is prepared to adopt the solution proposed by the *Guidelines*: i.e., appointing a tribal court judge in the city where most of the evidence and witnesses may be (Anchorage), or having the present court travel to Anchorage to hear whatever testimony cannot be solicited in any other way. *Guidelines*, at 67591. (It is not anticipated this would be required, but the *Guidelines* clearly indicate this should be an available option as a means of avoiding the denial of a transfer request.)

The protean nature of the petitioner's position in this regard parallels its now-asserted willingness to consider leaving T.S. in her present foster home.

CONCLUSION

The respondent respectfully requests that the petition for writ of certiorari be denied.

MARC RACICOT
Attorney General
CLAY R. SMITH*
Solicitor
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401
(406) 444-2026

**Attorney of Record*
for Respondent

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25 U.S.C. § 1903 (1988)

Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term –

(1) "child custody proceeding" shall mean and include –

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has

reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of

Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911(a) and (b) (1988).

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1918 (1988).

Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

> (i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
>
> (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
>
> (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court

has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

Mont. Code Ann. § 41-3-401 (1989).

Abuse neglect, and dependency petitions. (1) The county attorney, attorney general, or an attorney hired by the county welfare department or office of human services shall be responsible for filing all petitions alleging abuse, neglect, or dependency. The county attorney or attorney general, or an attorney hired by the county welfare department or office of human services with the written consent of the county attorney or attorney general, may require all state, county, and municipal agencies, including law enforcement agencies, to conduct such investigations and furnish such reports as may be necessary. Investigations as to financial status may not be made prior to the adjudicatory hearing provided for in 41-3-404.

(2) Upon receipt of a petition, the court shall set a date for an adjudicatory hearing on the petition. Such petitions shall be given preference by the court in setting hearing dates.

(3) A petition alleging abuse, neglect, or dependency is a civil action brought in the name of the state of Montana. The rules of civil procedure shall apply except as herein modified. Proceedings under a petition are not a bar to criminal prosecution.

(4) The parents or parent, guardian, or other person or agency having legal custody of the youth named in the petition, if residing in the state, shall be served personally with a copy of the petition and summons at least 5 days prior to the date set for hearing. If such person or agency cannot be served personally, the person or agency may be served by publication in the manner provided by

the Montana Rules of Civil Procedure for other types of proceedings.

(5) In the event personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall appoint an attorney to represent the unavailable party where in the opinion of the court the interests of justice require.

(6) If a parent of the child is a minor, notice shall be given to the minor parent's parents or guardian, and if there is no guardian the court shall appoint one.

(7) Any person interested in any cause under this chapter has the right to appear.

(8) Except where the proceeding is instituted or commenced at the request of the department of family services, a citation shall be issued and served upon a representative of the department prior to the court hearing.

(9) The petition shall:

(a) state the nature of the alleged abuse, neglect, or dependency;

(b) state the full name, age, and address of the youth and the name and address of his parents or guardian or person having legal custody of the youth;

(c) state the names, addresses, and relationship to the youth of all persons who are necessary parties to the action.

(10) The petition may ask for the following relief:

(a) temporary investigative authority and protective services;

(b) temporary legal custody;

(c) termination of the parent-child legal relationship and permanent legal custody with the right to consent to adoption;

(d) any combination of the above or such other relief as may be required for the best interest of the youth.

(11) The petition may be modified for different relief at any time within the discretion of the court.

(12) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party.

Mont. Code Ann. § 41-3-402 (1989).

Petition for temporary investigative authority and protective services. (1) In cases where it appears that a youth is abused or neglected or is in danger of being abused or neglected, the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services may file a petition for temporary investigative authority and protective services.

(2) A petition for temporary investigative authority and protective services shall state the specific authority requested and the facts establishing probable cause that a youth is abused or neglected or is in danger of being abused or neglected.

(3) The petition for temporary investigative authority and protective services shall be supported by an affidavit signed by the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services or a department of family services report stating in detail the facts upon which the request is based.

Mont. Code Ann. § 41-3-403 (1989).

Order for immediate protection of youth. (1)(a) Upon the filing of a petition for temporary investigative authority and protective services, the court may issue an order granting such relief as may be required for the immediate protection of the youth.

(b) The order, along with the petition and supporting documents, shall be served by a peace officer or a representative of the department of family services on the person or persons named therein. When the youth is placed in a medical facility or protective facility, the department shall notify the parents or parent, guardian, or other person having legal custody of the youth, at the time the placement is made or as soon thereafter as possible.

(c) The order shall require the person served to comply immediately with the terms thereof or to appear before the court issuing the order on the date specified and show cause why he has not complied with the order. The show cause hearing must be conducted within 20 days of the issuance of the order by the judge or a master appointed by the judge. The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of the order. Except as otherwise provided herein, the rules of civil procedures shall apply.

(d) Upon a failure to comply or show cause the court may hold the person in contempt or place temporary legal custody of the youth with the department of family services until further order.

(2) The court may grant the following kinds of relief:

(a) right of entry by a peace officer or department of family services worker;

(b) medical and psychological evaluation of youth or parents, guardians, or person having legal custody;

(c) require the youth, parents, guardians, or person having legal custody to receive counseling services;

(d) place the youth in temporary medical facility or facility for protection of the youth;

(e) require the parents, guardian, or other person having custody to furnish such services as the court may designate;

(f) such other temporary disposition as may be required in the best interest of the youth.

Selected Portions of Department of the Interior Guidelines on Implementation of Indian Child Welfare Act (44 Fed. Reg. 67,584, 67,591 (1979))

C.3. Determination of Good Cause to the contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

* * *

Although there was some support for the third and fourth criteria [of an earlier version of the guidelines] the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenager could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown would cause many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances

under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determined whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.